IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20440

ASSINIBOINE AND SIOUX TRIBES, *Appellants,*

v.

R. E. NORDWICK, et al., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLANTS

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INDEX AND TABLE OF CASES

	Page
Opinion Below	1
Jurisdiction	1
Statement	2
Specification of Errors	7
Summary of Argument	7

Argument:

I. The Tribes are the owners of the oil and gas interest in the 160 acres on appeal 9

A. The 1908 Act was designed to sell the Tribes' interests in surplus land for fair value with the United States acting as trustee 9

B. Beneficial title to the lands remained in the Tribes until they were divested of title 10

C. The reasons which evoked passage of the Act of March 3, 1927 preclude the view that the oil and gas go to the unperfected entries 11

D. Nothing in the legislative documents supports the view that Congress intended to divest the Tribes of their oil and gas 12

E. The language of the statute reserves the oil and gas to the Tribes; it does not grant the oil and gas to unperfected entries 14

1. In construing the 1927 Act the Tribes' rights must be judged by the most exacting fiduciary standards and the Act must be construed to resolve all doubts in favor of the Tribes 15

Page

2. "Undisposed of" in the 1927 Act does not mean "unentered" 17
F. The contemporary construction of the Land Office was that the 1927 Act reserved the oil and gas in the 160 acres to the Tribes 20
II. The district court did not correctly construe the 1927 Act 22
A. For its guiding principle the court below did not rely on public land law but on general law derived from the construction of a sales contract 23
B. The district court's illustration of instances employing the phrases "undisposed of" or "disposed of" do not support the district court's conclusion 24
1. The court below erroneously utilized Section 11 of the 1908 Act .. 24
2. The district court's three statutory illustrations (R. 71, fn. 9) do not support its conclusion 27
3. The allotment cases do not support the district court's conclusion 28
III. Nordwick was barred by laches and estoppel from claiming the oil and gas 32
Conclusion 35
Appendix 36
Exhibits received in evidence 36
Act of May 30, 1908, c. 237, 35 Stat. 558 36
Act of March 3, 1927, c. 376, 44 Stat. 1401 39

Citations

Cases:

Arenas v. *United States*, 322 U.S. 419 30
Ash Sheep Co. v. *United States*, 252 U.S. 159 10
Cherokee Nation v. *Georgia*, 5 Pet. 1 15
Choctaw Nation v. *United States*, 119 U.S. 1 ..... 16, 17

Page

Confederated Band of Ute Indians v. *United States,* 100 C. Cls. 413 (1943) 10
Haley v. *Seaton,* 281 F. 2d 620 (C.A. Dist. Col. 1960) 12
Hanson v. *United States,* 153 F. 2d 162 (C.A. 10, 1946) 10
Hill v. *Sumner,* 132 U.S. 118 (1889) 23
Ickes v. *Development Corp.,* 295 U.S. 639 11
Seminole Nation v. *United States,* 316 U.S. 286 15
Shriver v. *United States,* 159 U.S. 491 19
United States v. *Kagama,* 118 U.S. 375 16
United States v. *Payne,* 264 U.S. 446 16
United States v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339 16
United States v. *Shoshone Tribe,* 304 U.S. 111 17
Wilbur v. *United States,* 52 F. 2d 717 (C.A. Dist. Col. 1931), certiorari denied 284 U.S. 687 19
Wise v. *United States,* 297 F. 2d 822 (C.A. 10, 1961) 30
Worcester v. *Georgia,* 6 Pet. 515 17
Wyoming v. *United States,* 255 U.S. 489 ..... 11, 19
Yosemite Valley Case, 15 Wall. (82 U.S.) 77 (1873) 19

Statutes:

Act of April 15, 1874, c. 96, 18 Stat. 28, 1 Kappler 149 2
Act of February 8, 1887, c. 119, 24 Stat. 388, 25 U.S.C. 331 et seq. 9
Act of May 1, 1888, c. 213, 25 Stat. 113, 1 Kappler 261 2
Act of February 28, 1891, c. 383, sec. 3, 26 Stat. 795, 25 U.S.C. 397 12
Act of May 30, 1908, c. 237, 35 Stat. 558, 3 Kappler 377 ..... 1, 9, 19
Sec. 1 9
Sec. 2 9
Sec. 4 9
Sec. 5 9
Sec. 6 9
Sec. 7 ..... 3, 23
Sec. 8 ..... 3, 10, 23
Sec. 10 9

Page
Sec. 11 ..... 24, 25
Sec. 12 ..... 10, 13
Sec. 13 ..... 3, 10
Sec. 14 9
Act of February 19, 1909, c. 6, 35 Stat. 639 (43 U.S.C. 218) 19
Appropriation Act of August 1, 1914, c. 222, sec. 9, 38 Stat. 582, 4 Kappler 7, 18 27
Act of February 27, 1917, c. 133, 39 Stat. 944, 30 U.S.C. 86-89 27
Mineral Leasing Act of 1920, 30 U.S.C. 181, et seq. 11, 12, 17
Act of May 29, 1924, c. 210, 43 Stat. 244, 25 U.S.C. 398 12
Act of March 3, 1927, c. 299, sec. 1, 44 Stat. 1347, 25 U.S.C. 398a 12
Act of March 3, 1927, c. 376, 44 Stat. 1401, 4 Kappler 944 ..... 1, 2, 3, 7, 11, 14
Act of June 18, 1934, c. 576, sec. 3, 48 Stat. 984, 25 U.S.C. 463 ..... 14, 28
Act of May 11, 1938, c. 198, 52 Stat. 348, 25 U.S.C. 396a, et seq. 4
Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1129, 25 U.S.C. 575 14
Act of August 10, 1939, c. 662, sec. 1, 53 Stat. 1351, 25 U.S.C. 463d 14
Act of August 15, 1953, c. 509, sec. 2, 67 Stat. 592, 25 U.S.C. 611 14

Decisions of the Secretary of the Interior:

Arant v. State of Oregon, 2 L.D. 641 (1883) 18
Raymond Bear Hill, 52 L.D. 688 (1929) 28
Peter Fredericksen, 48 L.D. 440 (1922) 11, 12
Conrad Luft, 63 I.D. 46 (1956) 32
Mineral Reservations in Trust Patents for Allotments to Fort Peck etc. Indians, 53 I.D. 538 (1931) 30
Oil Prospecting Permits in Power Site Reserves, 48 L.D. 459 (1921) 18
Restoration of Lands Formerly Indian to Tribal Ownership, 54 I.D. 559 (1934) 11

Page

Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands, 56 I.D. 330 (1939) 10
State of Oregon v. Frakes, 33 L.D. 101 (1904) 18, 19

Miscellaneous:

Circulars and Regulations of the General Land Office (GPO 1930), 51 L.D. 76 28
Cohen, Felix S., Handbook of Federal Indian Law (1945) 11
Federal Indian Law (GPO 1958) 9, 11
H. Rept. No. 1966, 69th Cong., 2d sess. (1927) 13
S. Rept. 1632, 69th Cong., 2d sess. (1927) 13
34 Op. A.G. 171 (1924) 12

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Opinion Below

The opinion of the district court (R. 63-81) is not reported. It is set out at pages 63-81 of the record.

Jurisdiction

The jurisdiction of the district court was invoked under 28 U.S.C. 1331, on the ground that the matter in controversy arises under the laws of the United States (Act of May 30, 1908, c. 237, 35 Stat. 558, as amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401 (R. 1-2)) and exceeds, exclusive of interest and costs, the sum or value of $10,000. The

complaint seeks to establish title to the oil and gas underlying 240 acres of land on which a cash bonus of $4,389.60 for an oil and gas lease had been bid and accepted and seeks damages of $7,089.60 with interest (R. 3, 55-56, 29, 31). The judgment of the district court was entered August 4, 1965 (R. 88). Notice of appeal was filed August 31, 1965 (R. 90). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

Statement

This is an appeal from that part of the judgment of the United States District Court for the District of Montana declaring that the Tribes, appellants, have no right, title or interest in the oil and gas underlying 160 acres of land on the Fort Peck Indian Reservation. (R. 89.) The case presents a question of statutory construction to determine the meaning of the phrase "tribal lands undisposed of", as used in the Act of March 3, 1927, c. 376, 44 Stat. 1401, reserving to the Tribes the oil and gas in "tribal lands undisposed of" on the date of the statute. (The full text of the 1927 Act is printed in the Appendix, *infra,* p. 39.) The issue is whether Congress intended the oil and gas to be retained by the Tribes, or to pass to the holder of an unperfected homestead entry.

In 1888, the Fort Peck Indian Reservation was carved out of a larger reservation which Congress had established in 1874. Act of April 15, 1874, c. 96, 18 Stat. 28, 1 Kappler 149; Act of May 1, 1888, c. 213, 25 Stat. 113, 1 Kappler 261. Initially, all of the land within the Fort Peck Indian Reservation was tribal. In 1908, Congress directed that a portion of the tribal land be allotted in severalty, and the remainder, referred to as "surplus" or "ceded in trust" land, be appraised and "disposed of under the general provisions of the homestead, desert-land, mineral and townsite laws of the United States" for the appraised value,

but not less than $1.25 per acre. Act of May 30, 1908, sec. 7, c. 237, 35 Stat. 558, 3 Kappler 377. Section 8 of the 1908 Act specified that "when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered ***." Until the lands were disposed of, that is when the entryman earned is right to a patent, beneficial title remained in the Tribes. For full text see Appendix, pp. 37-38.) Section 13 of the 1908 Act required "that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof ***." (For full text see Appendix, p. 39.)

In the 1920's the reservation came to be considered valuable for oil and gas. Neither the 1908 Act nor any other statute provided for oil and gas leasing of "surplus" or "ceded in trust" lands. To remedy this, the 1908 Act was amended by the Act of March 3, 1927, c. 376, 44 Stat. 1401, "by specifically reserving to the *** [Tribes] the oil and gas in the tribal lands undisposed of on the date of the approval of this Act" and by authorizing oil and gas leasing by the "tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe." (Appendix 39-40; see R. 64.)

Arthur L. Nordwick, appellees' predecessor in title (hereinafter "Nordwick"), filed a homestead application to enter upon the 160 acres in suit on January 24, 1925, before the enactment of the 1927 Act. (Ex. 1; R. 64.) In 1929, Nordwick submitted final proof of compliance with the requirements of the law, except as to payment for the land. After payment was made in 1935, the final certificate was approved and the patent issued. Both the final certificate and the patent reserved the oil and gas to the Tribes, pursuant to the Act of March 3, 1927. (R. 65.)

Some 20 years after Nordwick received his patent reserving oil and gas to the Tribes, the tribal oil and gas were offered at lease sale held at the Fort Peck Agency on September 2, 1955, pursuant to the Indian Mineral Leasing Act of May 11, 1938, c. 198, 52 Stat. 348 (25 U.S.C. 396a, *et seq.*) and the regulations of the Department of the Interior. On September 5, 1955, Carter Oil Company entered the high bid of $4,389.60 as a bonus for a tribal lease, covering the oil and gas in 240 acres, including the 160 acres on appeal. The Tribes accepted the high bid and a lease was executed on behalf of the Tribes. (R. 65; Ex. 63, pp. 40-45.)

After the tribal sale, Carter acquired from Nordwick an oil and gas lease dated November 15, 1955 to the 240 acres (Ex. 65). Carter then advised the Bureau of Indian Affairs that after investigating the title, Carter was of the opinion that there should not have been any reservation of oil and gas in the patent issued to Nordwick and that a corrected patent should be issued. (R. 66; Ex. 54, December 9, 1955.)

About the same time, Nordwick wrote to the Secretary of the Interior requesting that a "corrected patent issue * * * containing no reservation of the oil and gas rights." (Ex. 55, December 13, 1955; R. 66.) The Field Solicitor, Department of the Interior, ruled that the patent correctly reserved the oil and gas to the Tribes, and that Carter was not entitled to rescission of its lease for alleged failure of title in the Tribes (Ex. 56, February 14, 1956; R. 66).

At the same time, the Field Solicitor advised that since "a property right of the Fort Peck Tribe is challenged, the Tribe should be notified of the raising of this question and given an opportunity to be represented by its own counsel." (Ex. 56, p. 2; R. 67, fn. 2.)

The Bureau of Land Management gave this no heed. Acting on the *ex parte* representation of Nordwick, without notice to the Tribes and without affording the Tribes an

opportunity to be heard, (R. 67, fn. 2), the Bureau of Land Management prepared a draft decision conforming to Nordwick's request that he, and not the Tribes, be given the oil and gas. The draft decision was submitted to the Assistant Solicitor, Department of the Interior, who was the legal advisor on minerals. On March 23, 1956, the Assistant Solicitor directed a memorandum to the Bureau of Land Management, ruling in positive terms that on the date of the Act of March 3, 1927, the 160 acres in suit were in entry status, that the statute itself reserved the oil and gas to the Tribes, and that the lands were "undisposed of" within the meaning of the 1927 Act. The Assistant Solicitor refused to endorse the draft decision. (Ex. 60; R. 66.)

Despite this advice, the Bureau of Land Management, on May 4, 1956, approved Nordwick's application and ordered that a supplemental patent issue to him "eliminating the reservation of oil and gas under the Act of March 3, 1927" (Ex. 61; R. 66). Five days later, on May 9, 1956, a supplemental patent was issued to Nordwick without the reservation of oil and gas. It recited that "This patent is issued supplemental to patent No. 1080633, dated December 13, 1935, which erroneously included oil and gas reservation under the Act of March 3, 1927." (Ex. 62; R. 67.) The record contains no explanation of this action by the Bureau of Land Management contrary to the advice of the Assistant Solicitor.

At no time prior to the issuance of the supplemental patent was any notice, or opportunity, given to the Tribes to present their views, or to defend the Tribes' title, or to participate in the proceedings culminating in the issuance of the supplemental patent to Nordwick. This *ex parte* procedure took place despite the explicit advice of the Field Solicitor, given in February preceding the issuance of the supplemental patent of May 9, 1956 to Nordwick, that the Tribes should

be notified that their title was being questioned and should be given an opportunity to be represented by their own counsel. (Ex. 56, February 14, 1956; R. 67, fn. 2.)

When the matter finally came to the Tribes' attention, they appealed to the Secretary of the Interior on April 11, 1957. No decision of any kind was forthcoming and this suit was brought on July 24, 1963. After suit was filed, the Tribes' appeal was dismissed on the ground that since the supplemental patent had already issued, the Secretary was without jurisdiction (R. 58-62, 67). In other words, the Department so arranged matters that it withheld notice to the Tribes of Nordwick's application for a supplemental patent until it granted Nordwick's application, issued a patent and stripped itself of jurisdiction.

The case was submitted below on the record, consisting of the pretrial order, the admissions of the parties and some 66 exhibits (R. 63). Two tracts of land were involved, identified in the judgment as Tract One—the 160 acres here on appeal, and Tract Two—80 acres, as to which the judgment below is final (R. 88). Nordwick filed his application for homestead entry on the 160-acre tract before March 3, 1927, the date of the 1927 Act and filed on the 80-acre tract after the date of the 1927 Act (R. 64). Nordwick did not fulfill the statutory requirements entitling him to a patent as to either tract until 1935 when payment was made for the land (R. 65).

In the court below the Tribes contended that the 160 acres here on appeal were "tribal lands undisposed of" on the date of the Act of March 3, 1927, since, as of that date, Nordwick, the entryman, had not fulfilled the statutory requirements specified in Section 8 of the 1908 Act (*supra*, p. 3) entitling him to a patent. Nordwick did not do so until 1935. Nordwick contended that entry and disposition were synonomous; that once the land was entered, it was not

"undisposed of" within the meaning of the 1927 Act. (R. 68).[1]

The district court ruled against the Tribes and held that the 160-acre tract here on appeal was disposed of on the date of the Act of March 3, 1927 and entered judgment accordingly (R. 88). This appeal followed.

Specification of Errors

1. The district court erred in construing a reservation to the Tribes of oil and gas in "tribal lands undisposed of" contained in the Act of March 3, 1927, c. 376, 44 Stat. 1401, to be the equivalent of a reservation of oil and gas in "tribal lands unentered", thus depriving the Tribes of the oil and gas in favor of an entryman.

2. The district court erred in adjudging that the Tribes have no right, title, or interest in the oil and gas underlying the 160 acres on appeal.

Summary of Argument

I. The Tribes were never divested of their beneficial title to the oil and gas. Prior to the 1927 Act there had been no divestiture of title. For the Tribes to lose title it was necessary for the entryman to earn the right to a patent by fulfilling the statutory requisites itemized in Section 8 of the 1908 Act. Nordwick did not fullfill these requisites until 1935. Accordingly on March 3, 1927, his entry was inchoate and the oil and gas was subject to displacement by Congress. (*Infra.* pp. 9-11.)

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[1] As to the 80-acre tract, entered after March 3, 1927, Nordwick contended that the Act of March 3, 1927 applied only to lands undisposed of on the day and date of the statute. Prior to March 3, 1927, the 80 acres had been allotted to an Indian. After March 3, 1927, the allotment was relinquished and became available for entry. Norwick entered in 1929. The district court ruled against Norwick on the 80-acre tract. (R. 89.) No appeal has been taken and the judgment is final.

The conclusion below that tribal oil and gas on unperfected entries was given to the entryman is contrary: To the Congressional policy of obtaining value for the Tribes' property interests as part of its obligation as trustee under the 1908 Act; to the reason for the 1927 Act—to provide authority for the Tribes to lease oil and gas; to the language of the 1927 Act, which reserves oil and gas in "undisposed of" tribal lands, not "unentered" tribal lands; to the legislative history of the 1927 Act which bears out the intent to protect the Tribes' oil and gas interests; and to the administrative construction contemporaneous with the issuance of the original patent to Nordwick reserving oil and gas to the Tribes. (*Infra.* pp. 11-15.)

A construction that the Tribes were divested of their oil and gas runs counter to the established meaning of "undisposed of" in public land law. It violates the canons governing the construction of Indian statutes, particularly where there is a Federal conflict in interest between tribal wards and entrymen. (*Infra,* pp. 15-22.)

II. The district court gave no consideration to the materials disclosing the Congressional intent, or to the law governing construction of Indian statutes. The district Court sought to establish other instances where "undisposed of" or "disposed of" meant "unentered", and on that postulate concluded "undisposed of" in the 1927 Act meant "unentered". The instances do not support the court's postulate and in any event do not fulfill the obligation to determine the Congressional intent in the 1927 Act. (*Infra,* pp. 22-32.)

III. Nordwick is barred by laches and estoppel. Nordwick waited 20 years after his patent, until the Tribes sold an oil and gas lease to a high bidder and granted a lease, before he applied for a patent to the oil and gas in an *ex parte* proceeding. (*nfra,* pp. 32-35.)

ARGUMENT

I. The Tribes are the owners of the oil and gas interest in the 160 acres on appeal.

We start with the proposition that the 160 acres, surface and minerals, were part of the 1888 reservation, beneficially owned by the Tribes, with title in the United States in trust for the Tribes. (See *supra,* p. 2.) The Act of May 30, 1908, was an example of the contemporaneous Federal policy of eliminating communal tribal ownership by allotting and selling the tribal lands. See the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, as amended (25 U.S.C. 331, *et seq.*) ; *Federal Indian Law,* pp. 115-117 (GPO 1958). Until the Tribes were divested of title, they remained the beneficial owners.

A. *The 1908 Act was designed to sell the Tribes' interests in surplus land for fair value with the United States acting as trustee.* The 1908 Act was not passed for the benefit of entrymen. It was designed to obtain for the Tribes the maximum permissible, consistent with the obligation of trustee, which Congress had assumed.

The 1908 Act simply provided a method for disposing of tribal land. Allotments were to be made to each individual member of the Tribes (sec. 2). With respect to the remainder of the land, the objective was to obtain fair value for the Tribes. Unlike public lands, the tribal land was not to be sold at the arbitrary public-land price of $1.25 per acre, regardless of value. The lands were to be classified and appraised (secs. 4, 5, 6). Particular provision was made to insure higher payment for lands of special worth, as in the case of irrigable lands, coal lands and townsite lots (secs. 1, 10, 14). Mineral lands were classified. Coal lands were appraised. Other mineral lands were not appraised

but were to bring the higher prices provided under the public land mineral laws (sec. 12). After classification and appraisal, all lands were to be "disposed of under the general provisions of the homestead, desert-land, mineral and town-site laws of the United States" for the appraised value but not less than $1.25 per acre. (sec. 8).

Section 8 of the 1908 Act explicitly spelled out what an entryman had to do to divest the Tribes of title and take title in himself. It specified that "when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof * * * and shall have made all required payments [of the sales price of the land], he shall be entitled to a patent for the lands entered: * * *." (For full text see Appendix 37-38.)

Essentially, Congress framed the 1908 Act to employ the public land disposal system to sell the Tribes' lands. But, the buyers were to pay the appraised value, and not less than the public land price of $1.25 per acre. This negates any suggestion that Congress was acting contrary to its trustee obligation by giving away tribal property.

B. *Beneficial title to the lands remained in the Tribes until they were divested of title.* The Tribes did not sell their lands to the United States. Section 13 of the 1908 Act carefully limited the obligation of the United States to that of "trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received." (For full text see Appendix, p. 39.) In Indian law, such lands are known as "surplus" or "ceded in trust" lands with title remaining in the United States in trust for the tribe until the lands were sold. *Ash Sheep Co.* v. *United States,* 252 U.S. 159 (1922); *Hanson* v. *United States,* 153 F.2d 162, 163 (C.A. 10, 1946); *Confederated Band of Ute Indians* v. *United States,* 100 C. Cls. 413, 431-2 (1943); *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands,* 56 I.D.

330, 337-8 (1939); *Restoration of Lands Formerly Indian to Tribal Ownership,* 54 I.D. 559, 560 (1934); *Peter Fredericksen,* 48 L.D. 440, 442 (1922); *Federal Indian Law* (GPO 1958), pp. 710-717; Cohen, Felix S., *Handbook of Federal Indian Law* (1945), pp. 334-5.

Following the 1908 Act the Tribes continued to be the beneficial owners until they were divested of their title, either by allotment, by outright sale and payment, or in the case of a homestead, when the entryman became entitled to a patent by doing all required of him in terms of settlement, improvements and payment in accordance with Section 8 of the 1908 Act (*supra,* p. 3).

In 1927, Congress amended the 1908 Act by "specifically reserving" to the Tribes, "the oil and gas in the tribal lands undisposed of" on March 3, 1927, the date of the Act. (Act of March 3, 1927, c. 376, 44 Stat. 1401; for full text see Appendix, 39-40.) On March 3, 1927, Nordwick was an entryman who had not fulfilled the requisites of Section 8 of the 1908 Act, and was not entitled to a patent (R. 65). The essence of the case is whether in the 1927 Act, Congress reserved the oil and gas in Nordwick's entry to the Tribes. There is no dispute as to the power of Congress to do so (R. 69). *Wyoming* v. *United States,* 255 U.S. 489, 497-498, 501-502 (1921).

C. *The reasons which evoked passage of the Act of March 3, 1927 preclude the view that the oil and gas go to the unperfected entries.* Beginning in the 1920's oil and gas values were indicated on the Fort Peck Indian Reservation. Leasing was the only method fair to both owner and operator for the development of oil and gas. It was the method adopted by the United States for its own lands, in lieu of the prior policy of transferring title to oil and gas under the public land mineral laws for nominal sums. Mineral Leasing Act of 1920 (30 U.S.C. 181, *et seq.*); *Ickes* v. *Development Corp.,* 295 U.S. 639, 645 (1935). Yet the leasing pro-

tection the Government had accorded itself had not been extended to the Tribes' oil and gas lands.

There was no statutory authority to lease the Tribes' oil and gas. The 1908 Act contained none. Under that Act, oil and gas went gratis with the surface. The Mineral Leasing Act of 1920 (30 U.S.C. 181, *et seq.*) was confined to oil and gas deposits "owned by the United States", and did not apply to tribal lands, not even those ceded in trust. 34 Op. A.G. 171 (1924); *Haley* v. *Seaton,* 281 F.2d 620, 623 (C.A. Dist. Col. 1960). See also, *Peter Fredericksen,* 48 L.D. 440, 443 (1922) where the Secretary of the Interior made the same ruling with respect to Fort Peck coal lands—"the Fort Peck surplus coal lands are Indian lands * * *." The Indian oil and gas leasing statute then in force had no application to Fort Peck lands. It applied only to lands "occupied by Indians who have bought and paid for the same * * *." (25 U.S.C. 397, 398.) A leasing statute passed in 1927 was limited to Executive Order reservations. Act of March 3, 1927, c. 299, sec. 1, 44 Stat. 1347, 25 U.S.C. 398a. Since the Fort Peck Reservation was created by statute, that Act had no application. (See *supra,* p. 2.) As matters stood, the Tribes were the beneficial owners of all minerals, including the oil and gas, in their undisposed of lands. But there was no authority to lease oil and gas, or any other minerals. It was to remedy this situation that proposed legislation was introduced to authorize oil and gas leasing by the Tribes. But to supply the remedy did not require Congress to divest the Tribes of their oil and gas in unperfected entries. And Congress did not do so. The legislative history bears this out.

D. *Nothing in the legislative documents supports the view that Congress intended to divest the Tribes of their oil and gas.* As introduced, the bill which became the 1927 Act, provided that "coal and other minerals, including oil and gas, in the tribal lands **** not disposed of at the time

of the passage of this act *** are hereby reserved specifically to the [Tribes] ***, and the title to all mineral deposits reserved to the United States within such reservation and not disposed of at the time of the passage of this act is hereby reinvested in such Indians [Tribes]." The bill also provided authority for the tribal council to grant oil and gas leases with the approval of the Secretary of the Interior. (H.R. 10976, printed in part in H. Rept. No. 1966, 69th Cong., 2d sess., (serial 8689) (1927) p. 2.)

In his report on the bill the Secretary of the Interior pointed out that Section 12 of the 1908 Act made applicable the public coal and mineral land laws under which the lands were subject to exploration, location and purchase for the appraised value, but not less than the statutory minimum. He went on to say "However, no mention is made in section 12 or elsewhere in the act of 1908 of oil and gas deposits. In view of the fact that the interests of the Indians are cared for under existing law with respect to the proceeds from the sale of their surplus lands, including coal and mineral lands, the necessity for the legislation provided by section 1 is not apparent except as to oil and gas deposits." H. Rept. No. 1966, *supra* p. 2.[2] The bill was restricted to oil and gas as recommended by the Secretary and enacted into the Act of March 3, 1927. H. Rept. No. 1966, *supra,* p. 1.

As this review shows, the Secretary pointed out the need for legislative protection of oil and gas deposits. H. Rept. No. 1966 *supra,* p. 2. In no way did he limit the need to oil and gas deposits on unentered land. No mention was made of the subject. If there had been an intent that the oil and gas attach to the inchoate rights of entrymen or settlers, it would have been expressed in the statute, or

[2] S. Rept. No. 1632, 69th Cong., 2d sess. (1927) on the same bill, simply reports the bill favorably as passed by the House and attaches H. Rept. No. 1966 as fully setting forth the facts.

mentioned in the legislative history. Instead of "undisposed of", the phrase "unentered" or "unentered and vacant" might have been used. Or the reservation of oil and gas might have been made "subject to existing rights and interests". Where Congress intends to preserve outstanding rights, such provisions are common in Indian land statutes.[3]

Here there was no reason for such provisions. Entrymen under the 1908 Act had no rights in the oil and gas. Here also, the choice as to who got the oil and gas, was not between the United States and the entryman, a situation where the Government might give away its own property. Here trust property was at stake and we may not assume that Congress *sub silentio* intended to give it away.

The legislative history establishes that the 1927 Act was a continuation of the Congressional policy to deal with the tribal property on a fair basis. A deficiency in the 1908 Act with respect to leasing oil and gas was remedied by amendment of the original statute. And the amendment applied to all lands held by the United States in trust for the Tribes. It was not limited to "unentered" lands. It applied to "tribal lands undisposed of".

E. *The language of the statute reserves the oil and gas to the Tribes; it does not grant the oil and gas to unperfected entries.* The Act of March 3, 1927 directed that the 1908 Act be "amended by specifically reserving" to the Tribes "the oil and gas in the tribal lands undisposed of" on the date of the Act and authorized oil and gas leasing by the Tribes with the approval of the Secretary of the Interior. (For full text see Appendix 39-40.)

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[3] E.g. Act of August 15, 1953, c. 509, sec. 2, 67 Stat. 592 printed in the historical note following 25 U.S.C. 611; Act of August 10, 1939, c. 662, sec. 1, 53 Stat. 1351, 25 U.S.C. 463d; Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1129, 25 U.S.C. 575; Act of June 18, 1934, c. 576, sec. 3, 49 Stat. 984, 25 U.S.C. 463.

The question is what did Congress mean by "tribal lands undisposed of" as used in the 1927 Act? Did Congress intend that the entryman, who had not yet earned his title as required by Section 8 of the 1908 Act, should receive the Tribes' oil and gas, or did Congress intend that the Tribes should retain and lease their oil and gas in such lands? More explicitly, did Congress use "undisposed of" as synonymous with "unentered", or did Congress use "undisposed of" to mean tribal lands as to which the Tribes had not been divested of title?

It is the Tribes' position that until the entryman satisfied the requisites of the homestead law, made his final proof and paid the purchase price, all as required by Section 8 of the 1908 Act, he was not entitled to a patent; and that until the entryman was entitled to a patent, title remained in the United States in trust for the Tribes and was undisposed of within the meaning of the 1927 Act. The language, as well as the history and legislative materials relating to the 1927 Act, contain nothing to support the conclusion that Congress used "tribal lands undisposed of" when it meant "tribal lands unentered."

1. *In construing the 1927 Act, the Tribes' rights must be judged by the most exacting fiduciary standards and the Act must be construed to resolve all doubts in favor of the Tribes.* The United States here is acting as trustee for the Tribes under the 1908 Act and its 1927 amendment, with the obligation to dispose of the Tribes' property on a fair basis (*supra,* pp. 9-10). It is a predicate of the Supreme Court decisions dealing with the relationship between the United States and Indian tribes, that the duties owed by the United States to Indian tribes with which it deals are to "be judged by the *most exacting* fiduciary standards." *Seminole Nation* v. *United States,* 316 U.S. 286, 297. "Their [Indian] relation to the United States resembles that of a ward to his guardian." *Cherokee Nation*

v. *Georgia,* 5 Pet. 1, 17. "These Indian tribes *are* the wards of the Nation." *United States* v. *Kagama,* 118 U.S. 375, 383. (Emphasis in original.) "***the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States* v. *Payne,* 264 U.S. 446, 448.

In *Choctaw Nation* v. *United States,* 119 U.S. 1, 28, the Supreme Court stated:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right,* without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws. (emphasis supplied.)

In construing the 1927 Act, we must keep in mind that we are dealing with an Indian statute, and all doubts must be resolved in favor of the Tribes. The rule was succinctly put in *United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 354 (1942) as follows:

> "* * * As stated in Choate v. Trapp, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that 'doubtful ex-

> pressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'."

In varying form this rule has been expressed in numerous decisions of the Supreme Court. For example, *Worcester* v. *Georgia,* 6 Pet. 515, 582 (1832), ("The language used in treaties with the Indians should never be construed to their prejudice."); *Choctaw Nation* v. *United States,* 119 U.S. 1, 28 (1886), ("The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, * * *."); *United States* v. *Shoshone Tribe,* 304 U.S. 111, 116 (1938).

We may not validly charge Congress with an intent to violate its obligation as a trustee. Yet this is the implication of the decision below. It would take extraordinarily clear language to support a construction that Congress availed itself of the advantage of its role as trustee, only to take the oil and gas from the Tribes and donate it to agricultural entrymen who had not yet earned title to their nonmineral land. Such a construction becomes particularly abhorrent when it is considered that if the land were owned by the United States, and not its wards, the oil and gas would not go to entrymen, but would be leased by the United States for itself. Mineral Leasing Act of 1920, *supra* (30 U.S.C. 181 *et seq.*).

Nothing supports a Congressional intent to breach the trust and donate the Tribes' oil and gas to holders of unperfected entries. On the contrary, everything points to an intent to protect the Tribes' oil and gas interests.

2. *"Undisposed of" in the 1927 Act does not mean "unentered".* In the first place, the phrase "tribal lands undisposed of" is not language Congress would use if it meant

"tribal lands unentered", which is the effect of the holding below. The words "undisposed of" have a special meaning in public land law. In public land law, a disposal means a complete alienation, with the vestiture of title in the one to whom the disposal is made. *Arant* v. *State of Oregon,* 2 L.D. 641 (1883); *State of Oregon* v. *Frakes,* 33 L.D. 101, 103 (1904); *Oil Prospecting Permits in Power Site Reserves,* 48 L.D. 459, 462-465 (1921).

In the *Frakes* case, the Secretary stated, *ubi supra:*

> "It [disposal] is that final and irrevocable act by which the right of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of, and in absence of any provision saving or preferring any particular inchoate equity, as that of a settler, disposal by Congress is absolute to the displacing of inchoate rights * * *."

In *Oil Prospecting Permits in Power Site Reserves,* the Secretary ruled (48 L.D. 464):

> "* * * the word 'disposal' in itself means as used in the section referred to [reserved from entry, location, or other disposal], an *alienation* of property. The word 'disposal' being a word of broad and varied significance its meaning is determined by its connection with other clauses. In this instance the word 'disposal' being used in connection with the words 'entry' and 'location' is subject to but one meaning, i.e.—an investiture of title. (Emphasis in original.)

In the case at bar there was no provision in the 1927 Act saving, or conferring a preference on, the inchoate equity of the entryman. If the 160 acres had been public land, the

oil and gas would have gone to the United States. The established meaning of words should not be changed to give a lesser degree of protection to trust land than the Government gives to its own land.

On March 3, 1927, the 160 acres were "undisposed of". Nordwick had not earned the right to a patent. As an entryman he had not done all that the law required of him.[4] "Until that act, the land is not disposed of, * * *." *State of Oregon* v. *Frakes, ubi supra.* Any time prior to that point, it stands undisputed in this case that the entryman's inchoate rights may be displaced by Congress (R. 69). *Wyoming* v. *United States,* 255 U.S. 489, 497-498, 501-2 (1921) (state selection); *Shriver* v. *United States,* 159 U.S. 491, 497 (1895) (homestead entry); *Yosemite Valley Case,* 15 Wall. (82 U.S.) 77, 87-8 (1873) (pre-emption claim); *Wilbur* v. *United States,* 53 F. 2d 717, 720 (C.A. Dist. Col. 1931), certiorari denied 284 U.S. 687 (homestead entry). And this is what Congress did when it "specifically reserved" the oil and gas in "tribal lands undisposed of" on the date of the 1927 Act.

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[4] Nordwick filed his application to enter the 160 acres as homestead under the Enlarged Homestead Act of February 19, 1909, c. 6, 35 Stat. 639 (43 U.S.C. 218), and the Fort Peck Act of May 30, 1908 (R. 64; Ex. 1). Under the homestead law, he was obliged to do certain cultivation work over a period of three years (43 U.S.C. 218), and under Section 8 of the 1908 Act (Appendix p. 38) he was obliged (a) to pay the appraised value of the land, one-fifth with the application for entry and the balance in five equal annual installments, (b) to comply with all requirements of the homestead law, and (c) to submit final proof within seven years, as extended, from the date of entry.

On March 3, 1927, the date of the 1927 Act, this is how matters stood with respect to Nordwick's entry on the 160 acres on appeal. For almost two years there had been on file and allowed, an application to enter the 160 acres under the homestead law. The initial one-fifth ($224) of the appraised value ($1120) had been paid at the time of filing (Exs. 1, 27). As of March 3, 1927, no part of the balance of $896 had been paid (Exs. 27, 31, 36). Nordwick did not make final proof and payment until 1935 when the final certificate and patent issued, both with a reservation of oil and gas to the Tribes. (R. 65; Exs. 31-50.)

In the second place, a conclusion that when Congress employed the phrase "tribal lands undisposed of", it intended to make a donation to the inchoate entry at the Tribes' expense, is at variance with the Congressional objective to obtain fair value for the tribal property. This objective is expressed by the whole design and plan of the 1908 Act. It is evidenced by the requirements of classification and appraisal, the call for payment of the appraised price, but not less than the public land price of $1.25 per acre, and by the explicit demand that all statutory requisites be satisfied, including payment in full of the sales price, before an entryman was entitled to a patent. (See *supra,* pp. 9-10.)

There is no warrant for saying Congress amended its 1908 plan of disposal, not to continue its protection of its tribal wards' interests, but to abandon its trustee obligation. Legislative evidence of the most compelling nature would be required to reach such a result, particularly if the plain, statutory words "undisposed of", were to be given the wholly different meaning of "unentered". Nothing in the legislative history justifies such a construction.

F. *The contemporary construction of the Land Office was that the 1927 Act reserved the oil and gas in the 160 acres to the Tribes.* The Land Office construed the 1927 Act, contemporaneously with its administration, to reserve the oil and gas in suit to the Tribes. After Nordwick made payment in full in 1935, a title report was prepared in the Land Office reciting "Oil and gas in undisposed of lands in Ft. Peck Indian Reserva. reserved 3/3/27 (44 Stat. 1401)" (Ex. 52, October 15, 1935). Thereafter, on November 8, 1935, Nordwick's final certificate was approved. The certificate recited (Ex. 51): "Patent to contain provisions, reservations, conditions and limitations of the Act of March 3, 1927 (44 Stat. 1401) as to oil and gas". The patent, itself, in the language of the 1927 Act, explicitly reserved the oil

and gas to the United States for the benefit of the Tribes (Ex. 53).

This review confirms the contemporaneous administrative construction and understanding that the 1927 Act removed the oil and gas from disposal to Nordwick. The single possible exception is the letter of March 29, 1930, from the General Land Office, accepting the final proof as to both tracts, subject to payment of the balance due. The letter advised the register and receiver to note on the final certificate that "the oil and gas in the additional entry [80 acres adjudicated below] is reserved under the Act of March 3, 1927, to the Fort Peck Indians" (Ex. 64). The letter is silent as to a similar reservation for the 160 acres. Both the final certificate and the patent noted the reservation of oil and gas as to both the 80 acre entry and the 160 acre entry on appeal (Exs. 51, 53; R. 65).

The officers responsible for the final certificate and the patent recognized that the 1927 Act reserved the oil and gas to the Tribes and acted accordingly. The Assistant Solicitor, Department of the Interior, in 1956 pointed out that since the statute itself reserved the oil and gas, the patent properly reserved the oil and gas to the Tribes since all of the land was "undisposed of" on March 3, 1927. The Assistant Solicitor, in a memorandum dated March 23, 1956, listing the authorities on which he relied, stated (Ex. 60):

> In this connection it is noted that although Nordwick signed a waiver of the oil and gas as to 80 acres only and not as to the remaining 160 acres, the patent reserved the oil and gas in all of the 240 acres. To forestall any possible action to issue a patent for the 160 acres free of any reservation, permit me to point out that the Bureau apparently inadvertently complied with the 1927 act as to that 160 acres, and the patent should stand. There is no requirement in the 1927 act that a grantee consent to the reservation. *In fact, the act it-*

self reserves the oil and gas in land undisposed of on the date of the act as all of the 240 acres were. (Emphasis supplied.)

As against this contemporaneous administrative view, the 1956 *ex parte* decision of the Bureau of Land Management (Ex. 61) granting a supplemental patent of oil and gas to Nordwick, should have been rejected out of hand. That decision was makeweight. It has no substance. It is singularly silent with respect to the law and cases bearing on the critical issue of "undisposed of". This, despite the contrary memorandum of the Assistant Solicitor and the cases and principles of law set out in that memorandum (Ex. 60).

But even more ignominious was the purported procedure resulting in the decision. The decision was the product of a unilateral proceeding conducted in the absence of the Tribes, the real parties in interest, and without affording them an opportunity to be heard. Neither Nordwick, the apparent moving party, nor any officer of the Department of the Interior saw fit to notify the Tribes of a proceeding where the title to tribal oil and gas was at stake. This despite the timely advice of the Department's Field Solicitor that the Tribes should be notified of the challenge to their title and given an opportunity to present their views. (Ex. 56, February 14, 1956; R. 66, 78.) As against the administrative view, contemporaneous with the issuance of the original patent in 1935, this 1956 action is entitled to no consideration.

II. The district court did not correctly construe the 1927 Act.

The court below construed the 1927 Act as if it read "tribal lands unentered" instead of "tribal lands undisposed of". The district court read the 1927 Act as if it

contained a proviso that the inchoate rights of entrymen were unaffected by the reservation of oil and gas. There is no valid support for so construing an Indian statute relating to trust property. (See *supra,* pp. 15-17.)

The opinion below does not reflect that the trial court undertook to ascertain the intent of Congress in the 1927 Act, by a review of the problem Congress sought to remedy; by analysis of the legislative history; or by recognition of the significance of the use of the words "tribal lands undisposed of" instead of language affirmatively conferring the oil and gas on incipient entries. The opinion is silent on the fact that we are dealing with trust property and an Indian statute. No reference is made to the canons governing the statutory construction of Indian statutes (see *supra,* pp. 15-17).

A. *For its guiding principle the court below did not rely on public land law but on general law derived from the construction of a sales contract.* The district court's approach was quite artificial. For a definition of "undisposed of" it did not turn to the public land statutes and decisions. It's postulate was the Supreme Court's observation that the words "dispose of" used in an ordinary sales contract between private parties, has no well defined legal meaning but in "each instance must be taken in connection with the circumstances in which it is used." (R. 68; citing *Hill* v. *Sumner,* 132 U.S. 118, 123 (1889).) Even that standard would be unobjectionable if properly applied. But here there was no call to invoke a sales contract principle. Section 7 of the 1908 Act explicitly directed that "the lands shall be disposed of under the general provisions of the homestead *** laws of the United States, ***." And Section 8 of the 1908 Act in terms required the entryman to comply "with all the requirements of the homestead law ***." These are the sections under which Nordwick proceeded.

We perceive no reason to depart from the definitions of "undisposed of", in the body of law controlling public land entries (*supra,* pp. 18-19), to seek out a general principle recited in a case involving a private, commercial sales contract.

B. *The district court's illustration of instances employing the phrases "undisposed of" or "disposed of" do not support the district court's conclusion.* As we analyze the opinion below, the district court relied on apparent instances where the phrase, "undisposed of", did not necessarily mean land where there had been final divestiture of the Government's title, and concluded that, therefore, the phrase did not have that meaning when used in the 1927 Act (R. 68-73, *passim*). The court's illustrations do not support its conclusion.

1. *The court below erroneously utilized Section 11 of the 1908 Act.* The court cited Section 11 of the 1908 Act (R. 69-70) as one of the instances where the phrase did not connote final divestiture. Preliminary to a discussion of Section 11, it should be noted that Section 8 of the 1908 Act, provided, that after classification and appraisal, the land would be opened to entry by proclamation of the President for the appraised price, but not less than $1.25 per acre. The entryman was to pay one-fifth down and the balance in five equal annual payments. The 1908 Act contemplated that some of the lands opened to entry by the proclamation would not be entered and that entries would be relinquished, or canceled.

Section 11, on which the court below relied so heavily, provided for such contingencies. The complete section reads as follows:

> That all lands hereby opened to settlement remaining *undisposed* of at the end of five years from the Pres-

> ident's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre under regulations to be prescribed by the Secretary of the Interior; and any lands remaining *unsold* ten years after such lands shall have been opened to entry shall be sold to the highest bidder for cash without regard to the minimum above stated [$1.25 per acre]: *Provided,* that not more than six hundred and forty acres shall be sold to any one person or company. (Emphasis supplied.)

We see that Section 11 dealt with lands remaining five years after the proclamation and lands remaining ten years after the proclamation. The section refers to lands remaining after five years as "undisposed of" and refers to lands remaining after ten years as "unsold." The five year lands were to be sold to the highest bidder but for not less than $1.25 per acre. The ten year lands were to be sold to the highest bidder without regard to the $1.25 minimum.

Reading the whole of Section 11, it seems quite apparent that Congress there was using "undisposed of" and "unsold" interchangeably. In both cases it meant that lands, opened by the Presidential proclamation, which were not under entry at the end of five years were to be sold at auction with a $1.25 upset price, and those remaining after ten years were to be sold to the high bidder, without the $1.25 minimum.

The district court dealt only with the words "undisposed of" in the first part of Section 11, and pointed out that if lands for which the entryman had not fulfilled the statutory requirements were "undisposed of," in the sense of final vestiture, then five years after the President's proclamation all entered lands would be up for cash sale (R. 69-70). It is patent that in Section 11 Congress was not directing the

sale of lands already sold, or entered. Yet the use of "undisposed of" in Section 11, apparently influenced the district court in its conclusion that 19 years later when the 1927 Act reserved oil and gas in "tribal lands undisposed of," Congress did not intend to reserve oil and gas in tribal trust lands under unperfected entry.

The court below quoted only a limited portion of Section 11(R. 69). This partial quote and the court's apparent reliance on it, would indicate that the district court overlooked the portion of Section 11 referring to the $1.25 per acre minimum, to the ten year lands and to the use of the word "unsold" in the corresponding place where "undisposed of" is used in connection with the five year lands. If the position of the words "undisposed of" and the word "unsold" had been reversed in Section 11, the meaning would have been precisely the same, and as we note later, the district court might just as well have made the reverse argument.

Reading all of Section 11 in context with the whole statute, it is unrealistic to say that the phrase "undisposed of" with respect to five year lands meant anything different from the word "unsold" used in the same section with respect to ten year lands. This internal conflict in the language of Section 11 is easily resolved. Both phrases meant "unsold" or "unentered." No other rational meaning is possible. But Section 11 with a built-in language conflict hardly provides support for the conclusion that when Congress used the phrase "tribal lands undisposed of" some 19 years later in an amendatory act designed to reserve the Tribes' own oil and gas, it meant the same thing as lands opened to settlement for five years "remaining undisposed of" as used in Section 11.

As we noted above, the district court might just as well have quoted and relied on the last half of Section 11 containing the word "unsold," instead of the first portion, containing the words "undisposed of." Had it so chosen,

the district court could have pointed out that when Congress meant to exclude lands already under entry, it did so by using the word "unsold," whereas in the 1927 Act, it did not say "unsold," but said "undisposed of." And such a construction would have more closely comported with the principles governing construction of Indian statutes (*supra,* pp. 15-17). Frankly, in our view, neither the "undisposed of" nor the "unsold" arguments based on conflicting language in Section 11, are of any help in determining the intent of Congress in the Act of March 3, 1927. In each instance the words must be given a rational meaning which will carry out the intent of Congress.

2. *The district court's three statutory illustrations (R. 71, fn. 9) do not support its conclusion.* The court below refers to other acts and cites three in which "undisposed of" does not necessarily include unperfected entries, i.e., where the statutory requirements have not been satisfied. (R. 71, fn. 9.) The first is the Appropriation Act of August 1, 1914, c. 222, sec. 9, 38 Stat. 582, 4 Kappler 7. That Act authorized additional allotments at Fort Peck so long as surplus lands remained "undisposed of." This is comparable to the Section 11 illustration (*supra,* pp. 24-27). Obviously an allotment statute may not be construed to create a conflict between an entryman and an allottee. The 1914 Act meant allotments could be made from those surplus lands which were available for allotment. Lands under valid entry are not available for allotment. But such lands are subject to the Congressional power to reserve the oil and gas for the Tribes (*supra,* p. 19).

The Act of February 27, 1917, c. 133, 39 Stat. 944, 30 U.S.C. 86-89, the second statute in the series, was a general statute applicable to all Indian reservations, and did not, as inferred in the opinion below, relate only to Fort Peck (R. 71, fn. 9). The 1917 Act authorized "surplus" Indian

lands classified as coal and "not otherwise reserved or disposed of" to be opened to agricultural entry, reserving the coal to the United States. The particular land, located at Fort Peck, was classified as grazing land, noncoal, under the 1908 Act and thereafter was entered under the 1908 Act. Between entry and final proof, the general 1917 Act became law and the land was reclassified as coal. The instructions issued in the letter of June 25, 1923 referred to by the court below (R. 71, fn. 9) did not turn on the meaning of "not otherwise reserved or disposed of." They rested on the ground that the special 1908 Act controlled over the general 1917 Act. The noncoal classification under the 1908 Act, the entry under the 1908 Act and the fulfillment of the statutory requirements of Section 8 of the 1908 Act, earned the entryman his patent under the 1908 Act. The reclassification under the general statute of the 1917 Act, did not operate to deprive the entryman of the coal. *Circulars and Regulations of the General Land Office,* p. 709 (1924), 51 L.D. 76.

The Act of June 18, 1934, c. 576, sec. 3, 48 Stat. 934, 25 U.S.C. 463, the third statute referred to by the district court in footnote 9 of the opinion below (R. 71), authorized surplus, or ceded in trust, Indian lands to be withdrawn from entry and restored to tribal ownership. However the statute explicitly protected outstanding valid rights or claims (*"Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act * * *.") The quoted language, or similar language, is generally employed when there is intent to protect the rights of entrymen, or settlers, or others with valid claims. (See fn. 3, *supra,* p. 14.) No such language appears i nthe 1927 Act.

3. *The allotment cases do not support the district court's conclusion.* The court below referred to the allotment case of *Raymond Bear Hill,* 52 L.D. 688 (1929) which stands for

the proposition that the oil and gas pass with an allotment selected and approved before the 1927 Act, but are reserved to the Tribes in an allotment selected and approved after the 1927 Act (R. 71-72). This is consistent with the Tribes' position. Raymond Bear Hill selected a tract of irrigable land and it was recorded on the allotment schedule and approved in 1923 (52 L.D. 690). That allotment selected and approved before the 1927 Act, divested the Tribes of title and on March 3, 1927 the allotted land was not "tribal land undisposed of." Raymond Bear Hill selected a lieu grazing allotment after March 3, 1927 and it was approved in 1929 (52 L.D. 690). On March 3, 1927 the Tribes held title to the grazing land subsequently selected for an allotment and accordingly the 1927 Act reserved the oil and gas to the Tribes.

We fail to see how these principles support the lower court's conclusion. They reflect the Tribes' position.

The court below quotes from a memorandum of the Secretary directed to the Commissioner of the Land Office as to the point in the allotment process at which allotted lands were no longer "tribal lands undisposed of" within the meaning of the 1927 Act. (R. 72.)[5] The Secretary observed that when an Indian selects his allotment and the selection is placed of record, meaning listed on the allotting agents' schedule, the land is disposed of under the 1927 Act. The subsequent approval of the allotment simply confirms the Indian's right. The Secretary pointed out that the Indian had done all that the law required of him.

We agree. When an Indian has selected his allotment and it is recorded on the allotting agent's schedule, he has done all that the law requires of him. There is nothing more he can do. At that point the land is disposed of. It is com-

[5] The source of the quotation is not identified. Frankly it sounds familiar, but we have not located it in any of the briefs filed below.

parable to the entryman who has performed all the requirements of settlement, improvements and payment under Section 8 of the 1908 Act. He has earned his right to a patent, although the paper has not issued to him.[6]

We think the court below erred when it apparently assimilated the position of an Indian, whose allotment selection was filed and recorded, with that of an entryman, still in the process of earning the right to a patent (R. 72). On March 3, 1927 and thereafter until he paid for the land in 1935, Nordwick was in the position of an Indian who *requested* an allotment, as distinguished from one whose selection of an allotment was recorded on the allotting agent's schedule. Compare, *Arenas* v. *United States,* 322 U.S. 419, 426-427 (1944); *Wise* v. *United States,* 297 F. 2d 822, 827 (C.A. 10, 1961).

The court below concerned itself with the decision in *Martin's* allotment reported in *Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompahgre Ute Indians,* 53 I.D. 538 (1931) (R. 72-73). Allotments for a number of Indians were selected from tribal lands at Fort Peck pursuant to the 1908 Act. The allotment selections were recorded on an allotment schedule dated February 28, 1927, a few days before the Act of March 3, 1927. The schedule was not formally approved until October 21, 1927, and at that time, Martin's allotment was excluded from approval because of an error on the schedule in the description of his selection. (53 I.D. 543.) The description error was thereafter corrected. The question then posed was whether the trust patent to Martin should reserve the oil and gas to the Tribes in view of the Act of March 3, 1927, which

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[6] In the court below the defendant apparently agreed also. The defendant stated (Def. Br., p. 19): "When a qualified Indian makes a selection of land in the field, he has done everything which is required of him and which he can do. At this point he is in the same position as a *homestead entryman who has made full payment and final proof.*" (Emphasis supplied.)

intervened before approval of the allotment with the description corrected.

It is significant that the Commissioner of the General Land Office raised the question apparently because of his understanding, consistent with public land law (*supra*, pp. 18-19), that (53 I.D. 544):

> "* * * the words 'undisposed of' [as used in the 1927 Act] import a final disposition of, and vested right to the land, and the allotment selection not having received departmental approval, the mere selection did not constitute a vested right."

The Secretary ruled in favor of the Indian. This was consistent with the principle that when an Indian selects his allotment in the field and the selection is recorded on the allotment schedule, the Indian has done all that he can do, and all that the law requires. He is in the same position as an entryman who has fulfilled all the statutory requirements entitling him to a patent. Insofar as the description of Martin's selection was erroneously set out on the schedule, the Secretary ruled that this was a clerical error and would be treated as if the schedule had shown the correct description (53 I.D. 543); that since the other selections on the original schedule with Martin's had been approved, this was the equivalent of an adjudication "that the setting aside of the land as an allotment in the field and its listing on the completed schedule was a disposition of the land within the meaning" of the 1927 Act, even though formal approval of the schedule did not take place until after March 3, 1927. (53 I.D. 544.)

The Secretary's decisions concerning allotments of tribal land to members of the Tribes, do not support the lower court's conclusion that the land in Nordwick's unperfected entry was disposed of. They support the opposite view. To

parallel the position of the Indians who selected allotments, which were recorded or listed on the allotment schedule before March 3, 1927, Nordwick would have had to fulfill all the statutory requirements spelled out in section 8 of the 1908 Act before March 3, 1927. This he did not do.

III. Nordwick was barred by laches and estoppel from claiming the oil and gas.

Nordwick accepted the certificate of final proof and the 1935 patent both containing the reservation of oil and gas. For 20 years thereafter, he never asserted any claim to the oil and gas. It was not until late 1955, after the lands were known to be valuable for oil and gas, after $4,389.60 had been bid as a bonus for a tribal oil and gas lease of the lands, and after Carter Oil Company took an oil and gas lease from him, that Nordwick claimed the oil and gas should have been included in his 1935 patent (Ex. 55; R. 65-67).

The district court correctly set forth the position of the Tribes, namely that even if Nordwick had a valid claim to the oil and gas, the supplemental patent was mistakenly issued to Nordwick on the grounds that Nordwick was estopped from obtaining the oil and gas (R. 76). Assuming *arguendo* that the 1935 patent erroneously contained a reservation of oil and gas, the rule is that acceptance of that patent without protest for a long period of time, here 20 years, estopped Nordwick from obtaining the oil and gas. This rule is strictly applied by the Department of the Interior in the case of public land oil and gas owned by the United States. *Conrad Luft,* 63 I.D. 46 (1956) and departmental decisions there cited at page 50. See also the discussion of the cases in the opinion below (R. 76-77).

Certainly the Secretary of the Interior ought not extend a lesser degree of care to trust oil and gas of Indian tribes than he gives to public land of the United States. This is particularly true where the Secretary serves two masters.

Here he has a conflict of interest between his functions as manager of the public lands and his obligations as administrator of Indian affairs and the manager of Indian trust property. To put it another way, if this had been a case between the United States and Nordwick for oil and gas on the public domain, even if Nordwick were right, the Secretary would have rejected Nordwick's bid for a supplemental patent on the ground of estoppel. *A fortiori* it should have been done in the case of trust property.

But here, the Tribes, the real parties in interest, and the only possible parties who could seek review, were kept out of the case by denying them notice of the proceedings. (*Supra,* pp. 4-6.) Here the Tribes, not Nordwick, were the record owners of the oil and gas. Here, the advice of the Solicitor's office not to take the oil and gas from the Tribes was ignored (R. 66, 78). Here, the Bureau of Land Management, self-shielded from the exposure of review, made free to donate the Tribes' oil and gas to Nordwick, 20 years after his patent was issued and accepted, after the oil and gas were known to be valuable, and after the bid of $4,389.60 for a tribal oil and gas lease had been accepted by the Tribes. Here the 1956 supplemental patent conveying the oil and gas speedily issued (decision dated May 4, 1956, patent issued May 9, 1956, Exs. 61, 62). By speedily issuing the patent, the Bureau of Land Management cut-off the Secretary's jurisdiction and avoided the slim chance that the Tribes might possibly get wind of the proceeding, seek to intervene and appeal to the Secretary. This was consistent with the design for *ex parte* proceedings.

The district court agrees that it would have been better practice for the Department to have afforded the Tribes an opportunity to appear and assert their claim of title. Particularly in view of the express recommendation of the Field Solicitor that this be done (R. 78). But the court observes it is not aware of any statute or regulation requir-

ing that this be done (R. 78). This may be. But, the practice generally followed is to give notice to adverse interests. Apart from this, the decent thing would have been for Nordwick, or the Bureau of Land Management to have served the Tribes with a copy of his application for a supplemental patent. Nordwick had granted a lease to Carter, the high bidder at the Tribes' lease sale, in which he made "no representation of ownership of the mineral rights" and specifically did not "warrant title to the lessee." (R. 66.) It may be safely assumed that both Carter and Nordwick were fully aware of the Tribes' interests.

The district court implies that since the question presented was one of law, rather than fact, *ex parte* proceedings are sanctioned (R. 78). But, if the Tribes had been parties, the defense of laches would certainly have been made before the Bureau with a right of appeal to the Secretary.

The district court is of the view that the Tribes "have suffered no prejudice by the delay in determining the ownership of the mineral rights." (R. 78.) The Tribes put their oil and gas up for public sale. The Tribes accepted the high bid of $4,389.60. After the high bidder took a lease from Nordwick it sought the return of its money on the ground of failure of title. In addition, the Tribes have been denied the rental they would have received under the lease and possible royalities. We do not follow the lower court's view that the Tribes have not been prejudiced.

Apart from the issue of title, the supplemental patent should be set aside for mistake. Nordwick was barred by laches and estoppel from receiving the oil and gas. The mistake was in not invoking the bar of laches and estoppel and in maintaining *in camera* proceedings to prevent the Tribes from asserting their claim of title and the defense of laches and estoppel.

One thing is certain from the record. Before 1955, Mr.

Nordwick had no notion that he owned, or was entitled to the oil and gas. When he entered the land, it was as an agriculturist. He entered on land classified as nonmineral. He never expected to receive oil and gas, or any other mineral. He never protested the reservation of oil and gas, or other minerals, in his patent. To Mr. Nordwick, the grant of oil and gas was a 1955 windfall arranged *ex parte* by the Bureau of Land Management.

Conclusion

That part of the judgment below relating to the 160 acres should be reversed with instructions to enter judgment declaring the Tribes the beneficial owners of the oil and gas underlying the 160 acres described in paragraph 3 of the judgment (R. 89).

Respectfully submitted,

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December, 1965

Certification

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Marvin J. Sonosky.

APPENDIX

Exhibits 1 through 66 were received in evidence under the pretrial order (R. 32).

Selected sections from the Act of May 30, 1908, c. 237, 35 Stat. 558, 3 Kappler 377.

CHAP. 237. An act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment.

* * * * * * *

SEC. 4. That upon the completion of said allotments the President of the United States shall appoint a commission consisting of three persons to inspect, classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians or reserved by the Secretary of the Interior, said commission to be constituted as follows: One of said commissioners shall be a person holding tribal relations with said Indians, one a representative of the Indian Bureau, and one a resident citizen of the State of Montana.

* * * * * * *

SEC. 7. That when said commission shall have completed the classification and appraisement of said lands and the same shall have been approved by the Secretary of the Interior the lands shall be disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States, except sections sixteen and thirty-six of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school pur-

poses. And in case either of said sections, or parts thereof, is lost to the State by reason of allotment thereof to any Indian or Indians, or by reservation or withdrawal under the provisions of this act or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral lands within said reservation, not exceeding two sections in any one township, which selections must be made within the sixty days immediately prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided,* That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 8. That the lands so classified and appraised as provided shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars and the Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged, but no entry shall be allowed under section twenty-three hundred and six of the Revised Statutes: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by said commission, which in no case shall be less than one dollar and twenty-five cents per acre for agricultural, grazing, and arid land, and shall be paid as follows: Upon all lands entered or filed upon under the provisions of the homestead law, there shall be paid one-fifth of the appraised value of

the land when entry or filing is made, and the remainder shall be paid in five equal annual installments in one, two, three, four, and five years, respectively, from and after date of entry or filing, and when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered: *Provided*, That aliens who have declared their intentions to become citizens of the United States may become such entrymen, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof: *And provided further*, That the fees and commissions at the time of commutation or final entry shall be the same as are now provided by law where the price of land is one dollar and twenty-five cents per acre: *Provided*, That nothing in this act shall prevent a citizen of the United States from commuting his homestead entry under the provisions of section two thousand three hundred and one of the Revised Statutes by paying for the land entered the price fixed by said commission, receiving credits for payments previously made.

* * * * * * *

SEC. 11. That all lands hereby opened to settlement remaining undisposed of at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre, under regulations to be prescribed by the Secretary of the Interior; and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder for cash, without regard to the minimum limit above stated: *Provided*, That not more than six hundred and forty acres shall be sold to any one person or company.

SEC. 12. That the lands within said reservation however classified, shall, on and after sixty days from the date fixed by the President's proclamation opening said lands, be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal land laws

at not less than the price therein fixed and not less than the appraised value of the land, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to Indians or withdrawn under the provisions of this act.

SEC. 13. That nothing in this act contained shall in any manner bind the United States to purchase any part of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, that may be granted to the State of Montana, the reserved tracts hereinbefore mentioned for agency and school purposes, or to dispose of lands except as provided herein, or to guarantee to find purchasers for said lands, or any part thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

* * * * * * *

Act of March 3, 1927, c. 376, 44 Stat. 1401, 4 Kappler 944.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of May 30, 1908 (Thirty-fifth Statutes page 558), providing for the allotment, sale, and disposal of lands on the Fort Peck Indian Reservation, Montana, is hereby amended by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act; and leases covering such land for oil and gas may be made by the Indians of the Fort Peck Reservation through their tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he may prescribe.

Sec. 2. (a) That the title to certain lands on the Fort Peck Indian Reservation, Montana, reserved for agency, school, and other administrative purposes (embracing four thousand and ninety-four and one-hundredth acres), pursuant to the provisions of sections 3 and 16 of such Act, as amended, is hereby reinvested in the Indians having tribal

rights on the Fort Peck Reservation, subject to the continued use of such lands for administrative purposes as long as needed for such purposes in the discretion of the Secretary of Interior.

(b) The Secretary of the Treasury is authorized and directed to deduct the sum of $5,117.52, representing the purchase price of such lands at the rate of $1.25 per acre, from moneys in the Treasury arising from the proceeds of the sale of lands disposed of under the provisions of such Act, as amended, and to credit the same to the United States as payment for the lands title to which is reinvested in accordance with the provisions of this section.

(6929-4)